82-529

No. _____

Office - Supreme Court, U.S.
FILED
SEP 25 1982
ALEXANDER L. STEVAS,
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

DONNA M. MURILLO, ET ALS,

Petitioners,

vs.

W. LEWIS BAMBRICK, CLERK OF
THE SUPERIOR COURT OF NEW JERSEY,

Respondent,

PETITION FOR A WRIT OF CERTIORARI

ARTHUR USCHER, ESQ.
Counsel of Record
For Petitioners

ARTHUR USCHER, ESQ.
A Professional Corporation
Attorney for Petitioners,
DONNA M. MURILLO, et als

435 Summit Avenue
Hackensack, NJ 07601
(201) 489-9611

QUESTIONS PRESENTED

1. Is the right to divorce a fundamental right under the United States Constitution as is the right to marriage?

2. If the right to divorce is a fundamental right, did the Court of Appeals err in not applying the strict scrutiny analysis of the Equal Protection Clause to a State statute which denied divorce litigants a divorce unless they paid a substantial trial fee required of no other litigant in the same Court system?

3. In a unified state civil court system using the same judges, rules, courtrooms, facilities, personnel and sources of operating funds, may a state constitutionally deny a trial to that group of litigants whose trials actually cost the state the least, unless those litigants pay a substantial fee for their trials, while giving every other group of litigants using the same court system a free trial?

4. May a Federal appellate court, without any contrary evidence before it, uphold a discriminatory state statute prospectively when it is proven conclusively and conceded by the state that the purported rational basis for the statute does not exist?

PARTIES TO THE PETITION

This is a class action in which the petitioning parties are Donna M. Murillo and more than 25,000 other New Jersey matrimonial litigants who were denied a trial by a discriminatory state statute unless they paid a $50 or $60 trial fee which no other litigant had to pay. The total amount of those fees at present held in escrow and collecting interest, is about $2 million.

The respondent is Lewis W. Bambrick, Clerk of the Superior Court of New Jersey, recipient of funds paid to the Superior Court, who represents the interests of the State of New Jersey.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PETITION ii

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 3

PRELIMINARY STATEMENT 4

STATEMENT OF THE CASE 6

REASONS FOR GRANTING THE WRIT:

A. The Third Circuit Majority Decision Conflicts With The Law Of This Court And Other Circuits By Not Applying Strict Scrutiny To A State Statute Denying A Fundamental Right 14

B. Even Were The Court Not To Consider Divorce A Fundamental Right The Third Circuit Majority Upheld The Constitutionality Of A Discriminatory Statute Without Any Rational Basis For It . . . 22

CONCLUSION 32

TABLE OF CONTENTS

APPENDIX A

June 17, 1982 Opinion of the Third Circuit Court of Appeals . 1a

APPENDIX B

February 20, 1981 Opinion of the United States District Court . . 42a

APPENDIX C

June 17, 1982 Judgment of the Third Circuit Court of Appeals 77a

APPENDIX D

July 12, 1982 Petition for Rehearing Denied 78a

TABLE OF AUTHORITIES

Cases Cited:

Boddie v. Connecticut, 401 U.S. 371 (1971) 15

Carey v. Population Services Int'l., 431 U.S. 678 (1977) 20

Delaware River Basin Comm. v. Bucks County Water & Sewer Auth., 641 F.2D 1087 (3rd Cir. 1981) . . 22

Dunn v. Blumstein, 405 U.S. 330 (1972) 19

TABLE OF CONTENTS

Cases Cited:

Eisenstadt v. Baird,
405 U.S. 438 (1973) 20

Ferguson v. Skrupa,
372 U.S. 726 (1963) 29

G.D. Searle & Co. v. Cohn,
-US- 71 L.Ed2 250 (1982) 25

Illinois State Board of Election
v. Socialist Workers Party,
440 U.S. 173 (1979) 19

Johnson v. Robinson,
415 U.S. 361 (1974) 24, 26

Kahn v. Shevin,
416 U.S. 351 (1975) 29

Loving v. Virginia,
388 U.S. 1 (1967) 15, 16

Massachusetts Bd. of Retirement
v. Murgia,
427 U.S. 307, 314 (1976) . . . 24, 25

Matthews v. DeCastro,
429 U.S. 181 (1976) 23

Matthews v. Lucas,
427 U.S. 495, 510 (1976) 23

McGinnis v. Royster,
410 U.S. 263 (1973) 25

Memorial Hospital v. Maricopa County,
415 U.S. 250 (1974) 20

TABLE OF CONTENTS

Cases Cited:

Meyer v. Nebraska,
262 U.S. 390 (1923) 15

Michael M. v. Superior Court
of Sonoma County,
450 U.S. 464 (1981) 27

Minnesota v. Clover Leaf
Creamery Co.,
449 U.S. 456 (1981) 5, 25, 29

Oregon v. Mitchell,
400 U.S. 112 (1970) 19

Royster v. Guano,
253 U.S. 412 (1920) 5

San Antonio Independent School
District v. Rodriguez
411 U.S. 1 (1973) 19, 23, 24

Schweiker v. Wilson,
450 U.S. 221 (1981) 5, 23, 25, 29

Shapiro v. Thompson,
394 U.S. 618 (1969) 19

Skinner v. Oklahoma,
316 U.S. 535 (1942) 15

U.S.D.A. v. Moreno,
413 U.S. 528 (1973) 25

U.S. v. Kras,
409 U.S. 434 (1973) 15, 16

U.S. v. Ortiz,
442 U.S. 841 (1975) 12

TABLE OF CONTENTS

Cases Cited:

U.S. Railroad Retirement Board v. Fritz, 449 U.S. 166 (1980) . . . 5, 23, 25, 30

Vance v. Bradley, 440 U.S. 93 (1979) 23

Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) 25

Western & S.L.I. Co. v. Bd. of Equalization, 68 L.Ed2 514 (1981) 5, 25

Zablocki v. Redhail, 434 U.S. 374 (1978) 15, 16, 19

Constitutional Provisions Cited:

Fourteenth Amendment of the United States Constitution 3

Codes Cited:

28 U.S.C. 1254 (1) 3

28 U.S.C. 1343 (3) (4) 8

Statutes Cited:

N.J.S. 2A:34-16 . . . . 2, 3, 7, 8, 10, 12, 18, 21, 25, 26, 27, 28

TABLE OF CONTENTS

Rules Cited:

New Jersey Court Rule 4:79-2 . . . . . 3, 7

New Jersey Court Rule 1:13-2 4

Other Authority Cited:

Developments in the Law: The Constitution and the Family, 93 Har. L. Rev. 1156, 1311 (1980) 17

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

DONNA M. MURILLO, ET ALS,

Petitioners,

vs.

W. LEWIS BAMBRICK, CLERK OF
THE SUPERIOR COURT OF NEW JERSEY,

Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Arthur Uscher, Esq., on behalf of Donna M. Murillo and more than 25,000 New Jersey matrimonial litigants comprising the petitioning class, petitions for a Writ of Certiorari to review a 2-1 judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit (Appendix A, infra, 1a to 41a) is reported at 681 F.2d 898 (1982). The opinion of the District Court (Appendix B, infra, 42a to 76a) is reported at 508 Fed. Supp. 830 (D.C.N.J. 1981).

JURISDICTION

On June 17, 1982, in a two-to-one decision, the Court of Appeals for the Third Circuit reversed a judgment of the United States District Court for the District of New Jersey which had previously held that N.J.S. 2A:34-16, now repealed, was unconstitutional. (Appendix C, infra, 77a). Judges Adams and Rosenn voted to reverse. Judge Sloviter dissented. A Petition for Rehearing En Banc was denied on July 12, 1982, with Judges Gibbons, Higginbotham and Sloviter recorded as favoring a rehearing.

(Appendix D, infra, 78a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Equal Protection Clause of the Fourteenth Amendment of the United States Constitution provides in relevant part:

> "No State shall make or enforce any law which shall... deny to any person within its jurisdiction the equal protection of the laws."

2. N.J.S. 2A:34-16, now repealed, provided that:

> "Except in actions in forma pauperis, before any matrimonial action is approved for trial the plaintiff or counterclaimant shall pay to the Clerk of the Superior Court, for the use of the State, the sum of $50.00 and in litigated actions the additional sum of $10.00."

3. New Jersey Rule 4:79-2, now deleted, provided that:

> "Except as otherwise provided by R.1:13-2 (relating to actions brought by indigents), before any matrimonial action is approved for trial, the plaintiff or counterclaimant shall deposit with the Clerk a sum of $50.00 and in litigated actions the additional sum of $10.00 for stenographic fee. The aforesaid fees together with the request for an approval for a trial of the matrimonial action shall be forwarded to the Clerk within thirty days of the entry of default or the service of a pleading contesting the action."

PRELIMINARY STATEMENT

The equal protection clause of the 14th Amendment of the U. S. Constitution has been gutted and left for dead on the streets of Philadelphia by the majority decision in this case.

Petitioner uses this strong language seriously because the reasoning in the majority opinion flies in the face of equal protection law as it has been developing

since Royster v. Guano, 253 U.S. 412 (1920); and particularly in the recent cases of Western & S.L.I. Co. v. Bd. of Equalization, 68 L.Ed2 514 (1981); Schweiker v. Wilson, 450 U.S. 221 (1981); Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981), and U.S. Railroad Retirement Board v. Fritz, 449 U.S. 166 (1980).

Even more at odds with 14th Amendment equal protection law enunciated by the U. S. Supreme Court, is the majority's decision holding that once a governmental attorney or the court itself has fantasized a purported hypothetical rational basis for a discriminatory statute, not even admissions by the state and its legislature that the purported rational basis is, in fact, non-existent will cause the discriminatory statute to be declared unconstitutional, even prospectively.

STATEMENT OF THE CASE

In 1979, Petitioner, Donna M. Murillo's marriage had deteriorated to the point where only a divorce gave her any hope for any happiness at all in her future life. Having met all of the legal requirements entitling her to a divorce under New Jersey law, she filed the required Complaint in the New Jersey Superior Court, paying the same filing fee (then $60) that every other litigant paid to file a Complaint in that Court.

Although every other litigant (tort, probate, contract, jury, non-jury) would then automatically move up the Superior Court trial list and eventually have a trial, Donna Murillo would not. She was a divorce litigant, and because of that alone, she was denied a trial unless she paid the Clerk of the Superior Court an additional $50 or $60 as a trial fee. This

additional discriminatory fee was required by the challenged statute N.J.S. 2A:34-16 and New Jersey Court Rule 4:79-2, which supported it.

This denial of trial denied Donna Murillo the right to a divorce because without a trial (even if it took only 5 minutes) Donna Murillo could not be divorced even though she met all substantive requirements entitling her to a divorce under New Jersey law.

Although during argument, the state said $50 was not a lot of money, it was to this Petitioner and probably hundreds, if not thousands of others among the 25,000 in this class. Petitioner was a domestic and earned $25-$28 per day. Even though she might have followed the in forma pauperis route, she was old-fashioned and proud and wanted to pay her own way. She did so by paying the $60 complaint filing fee paid by all, but rebelled at paying the discrimina-

tory divorce trial fee.

Petitioner, therefore, brought this suit in the Federal District Court for the District of New Jersey to declare N.J.S. 2A:34-16 unconstitutional on 14th Amendment equal protection grounds. Jurisdiction was invoked under 28 U.S.C. 1343 (3), (4).

The Federal District Court pushed for an early trial of the case so that if the statute were found unconstitutional, the state would be prohibited as soon as possible from digging illegal divorce trial fees out of the pockets of its residents.

However, the state asked the Federal District Court to defer to the state legislature which was then seriously considering repealing N.J.S. 2A:34-16 so that the legislature would not be embarrassed by the Federal Court finding the statute unconstitutional. The state asked for a delay so that the legislature could act.

The court acceded to the state's request but ordered all divorce litigants

required to pay a trial fee from the date of the suit filed by Petitioner to be included in a class and further ordered that the divorce trial fees forwarded to the Clerk of the Superior Court be kept in an escrow account, drawing interest, pending outcome of the suit.

During all of these proceedings the District Court told the state that it would consider it a "most unkind act" should the Court delay taking action so the state legislature could repeal the act, if the state would then come back into Court to ask for the funds which the District Court had been, in effect, "sandbagged" into permitting the state to collect in escrow during this period of delay. This is actually what the state has done.

It should be noted that between the time the Federal District Court did the

state a favor by granting its request for delay and the time N.J.S. 2A:34-16 was actually repealed by the state legislature, more than 25,000 divorce litigants were admitted to the class and had their funds held in escrow by the Clerk of the Superior Court which sum, together with interest, now totals about $2 million dollars.

At the time of trial, in response to discovery, the state had set forth four purported factual statements which the state alleged were reasonably and rationally related to the legislative objective of N.J.S. 2A:34-16. The gist of the first three basically was that the judges of the Superior Court and the Clerk of the Superior Court and his staff, spent more time on matrimonial than on other types of cases. The fourth factual basis was, "Trial fee encourages reflective thought."

When the case came on for trial the state's own statistics, prepared by the

Administrative Office of the Courts, showed that, in fact, matrimonial cases cost substantially less to administer and to try than did all other types of cases in the Superior Court of New Jersey.

With this information in hand and entered into evidence as a joint exhibit, the state then formally withdrew its allegations that the factual basis for the trial fee to matrimonial litigants was more judge and administrative time and left only the remaining purported rational basis that "Trial fee encourages reflective thought."

After plaintiff put in evidence showing the genesis of the trial fee statute and that it no longer had any reason for existence, the plaintiff rested. The state put in no evidence whatsoever.

The trial court found that the statute in question was in fact discriminatory without rational basis or legitimate legis-

lative objective and ordered the escrow funds held by the Clerk of the Superior Court to be returned to the more than 25,000 divorce litigants who had wrongfully been required to pay them.

The state then appealed the trial court decision to the Third Circuit Court of Appeals on a wholly new ground which had not been raised below (see U.S. v. Ortiz, 442 U.S. 841 (1975), i.e., that the state legislature in saving N.J.S. 2A:34-16 from repeal in 1971, could have reasonably believed that it would cost more to administer the new "no-fault" matrimonial law and, therefore, the statute was constitutional. There was not a smidgin of evidence in the case to support such a speculation about what the state legislature thought or might have thought, in 1971.

The majority of the Court of Appeals bought this argument and embellished it with hypotheticals and fantasies of their own

even though it was clearly proven at trial that it actually cost substantially less, not more, to administer matrimonial cases.

REASONS FOR GRANTING WRIT

THE THIRD CIRCUIT MAJORITY DECISION CONFLICTS WITH THE LAW OF THIS COURT AND OTHER CIRCUITS BY NOT APPLYING STRICT SCRUTINY TO A STATE STATUTE DENYING A FUNDAMENTAL RIGHT.

This case is the perfect vehicle for this Court to establish once and for all whether the right to divorce is a fundamental constitutional right. The Court has picked around this issue in a line of cases which indicate that the right to divorce is fundamental, but which has made no definitive statement that it is.

The uncertainty raised by this issue is a major cause of this appeal and probably leads to much unnecessary litigation throughout the nation.

The right to marriage has been firmly established by this Court as a fundamental right. Petitioner urges that concomitantly and logically the right to a divorce should clearly be recognized by this Court as a fundamental right which is imbedded in our

Constitution. Zablocki v. Redhail, 434 U.S. 374 (1978); United States v. Kras, 409 U.S. 434 (1973); Boddie v. Connecticut, 401 U.S. 371 (1971); and Loving v. Virginia, 388 U.S. 1 (1967).

As stated in Boddie, supra, at 376: "marriage involves interests of basic importance in our society"; see Loving v. Virginia, supra; Skinner v. Oklahoma, 316 U.S. 535 (1942); Meyer v. Nebraska, 262 U.S. 390 (1923); and the right to a divorce is the "adjustment of a fundamental human relationship", Boddie v. Connecticut, supra, at 383.[1]

---

[1]See also United States v. Kras, supra, where the Court concluded that filing fees in bankruptcy actions did not deprive indigents of due process or equal protection. Boddie was distinguished primarily because:

> "The denial of access to the judicial forum in Boddie touched directly... on the marital relationship and on the associational interests that surround the establishment and dissolution of that relationship. On many occasions we have recognized the fundamental importance of these interests

The trend toward declaring divorce a fundamental right was reaffirmed in Zablocki v. Redhail, supra, at 384, where the Court stated that the "right to marry is part of the fundamental 'right of privacy' implicit in the Fourteenth Amendment's Due Process Clause."...and that the "decision to marry is among the personal decisions protected by the right of privacy."

"Because the right to marry inheres in the right to privacy, and the Court has recognized that 'it would make little sense' to recognize a right of privacy with respect to some but not all matters of family life, see Zablocki v. Redhail, supra, at 386, it follows that the same considerations apply to the right to dissolve the marriage relationship." Appendix A, Page 32a, Judge Sloviter dissenting, "Both logic and practi-

---

under our Constitution. See, for example, Loving v. Virginia...", U.S. v. Kras, supra, at 444.

cality require that marriage and divorce be considered correlative." Appendix A, Page 32a, Judge Sloviter dissenting.[2]

In line with the above cases, the majority arguably concedes that the "right to divorce" may be a fundamental right which would trigger the heightened scrutiny test of the Equal Protection Clause. Appendix A, Page 8a, Majority. However, the majority erroneously concludes that the right to divorce was not at issue in this case because the matrimonial trial fees "did not significantly, directly, or substantially infringe upon the right of individuals to obtain dissolutions of their marriages." Appendix A, Page 9a, Majority.

---

[2]"A liberal right to divorce may be a prerequisite to full exercise of the right to marry; to the extent divorce is unavailable, the right to remarry is burdened... The liberty and privacy interests in obtaining freedom from an unsatisfactory relationship are sufficiently strong to justify constitutional protection of divorce..." Developments in the Law: The Constitution and the Family, 93 Harv. L. Rev. 1156, 1311 (1980).

That conclusion is wrong because the majority reaches it "in the face of the contrary findings of the district court" where that court found that since the petitioner, Donna Murillo, worked as a domestic earning $25.00 to $28.00 a day, "the State of New Jersey had thus placed [Murillo] in a dilemma: either she would have had to pay what was to her a substantial sum to sue for divorce; or she would have remained hostage to a marriage which under the substantive law of the State she was entitled to have dissolved." (Appendix A, Pages 34a to 35a, Judge Sloviter dissenting).

As Judge Sloviter further points out in her dissenting opinion (Appendix A, Page 35a), in determining whether N.J.S. 2A:34-16 infringed upon one's right to a divorce, "I would look both to the district court findings and the undisputed fact that the matrimonial fee penalized each New Jersey resident (with the exception of indigents) who sought to exercise his or her right to obtain a

divorce. These evince a sufficiently direct and sweeping burden on a fundamental right to subject the classification to heightened judicial scrutiny."[3]

If a statute impinges upon fundamental freedoms protected by the Constitution, the statutory classification must, under the equal protection clause, be necessary to the achievement of a compelling state interest. Illinois State Board of Election v. Socialist Workers Party, 440 U.S. 173 (1979); Zablocki v. Redhail, supra; San Antonio Independent

---

[3]Total preclusion is not a prerequisite to invocation of strict scrutiny. "It has long been established that a State may not impose a penalty upon those who exercise a right guaranteed by the Constitution...". Shapiro v. Thompson, 394 U.S. 618 (1969); and Oregon v. Mitchell, 400 U.S. 112 (1970).

In Shapiro, where the issue was a durational residence requirement as a prerequisite prior to qualifying for welfare benefits, the Court found no need to dispute the "evidence that few welfare recipients have in fact been deterred [from moving] by residence requirements." Id. at 650. In fact, none of the litigants in Shapiro had themselves been deterred from receiving welfare benefits. See also Dunn v. Blumstein, 405 U.S. 330 (1972).

School District v. Rodriguez, 411 U.S. 1 (1973); and Eisenstadt v. Baird, 405 U.S. 438 (1973). In essence, the statutory classification can be upheld only if it is "supported by sufficient state interests" which are "closely tailored to effectuate only those interests." Carey v. Population Services Int'l., 431 U.S. 678 (1977); and Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974).

Here, the matrimonial fees cannot be necessary or "closely tailored" to defray the higher costs of divorce actions when, as a factual matter, those higher costs do not exist. (See Appendix A, Page 40a, Judge Sloviter dissenting). "The State produced no evidence that there was any basis to charge a matrimonial litigant a higher fee; it ultimately abandoned the argument that there was any empirical basis for such a higher fee, and in fact it is currently charging all litigants the same general

filing fee, which it increased from $60 to $75 in 1981 'to adjust for the elimination of the matrimonial fees and to compensate for inflationary pressure'." (Appendix A, Page 41a, Judge Sloviter dissenting).

Because the matrimonial trial fees affect the exercise of petitioners' fundamental right to divorce, N.J.S. 2A:34-16 must fall since it cannot withstand the heightened scrutiny review of the Equal Protection Clause.

EVEN WERE THE COURT NOT TO CONSIDER DIVORCE A FUNDAMENTAL RIGHT THE THIRD CIRCUIT MAJORITY UPHELD THE CONSTITUTIONALITY OF A DISCRIMINATORY STATUTE WITHOUT ANY RATIONAL BASIS FOR IT.

The decision of the majority of the Court of Appeals flies in the face of the Third Circuit's own decisions (see footnote 4) and makes a mockery of the "rational basis review" of the Equal Protection

---

[4]The majority's decision even runs afoul of the Third Circuit's next most recent equal protection decision, Delaware River Basin Comm. v. Bucks County Water & Sewer Auth., 641 F.2d 1087 (3rd Cir. 1981) where the Court stated that when reviewing a classification under the rationality test, the court must conduct a two-step analysis:

> "First, it should identify the purposes of the statute and assure itself that these purposes are legitimate; ordinarily this inquiry will involve examination of statements of purpose and other evidence in the legislative history. Second, having identified the governmental purposes, the court must determine whether the classification is rationally related to the achievement of these goals."

Clause. The rational basis review is by no means a "toothless one", Matthews v. Lucas, 427 U.S. 495, 510 (1976), and at least requires that the legislation classify the persons it affects in a manner rationally related to "legitimate articulated state purposes". San Antonio Independent School District v. Rodriguez, supra; Schweiker v. Wilson, supra; Vance v. Bradley, 440 U.S. 93 (1979), and Matthews v. DeCastro, 429 U.S. 181 (1976).

The Court then went on to state:

> "A statute's classifications will invariably be rationally related to a purpose so defined since the 'purpose' is, in effect, a restatement of the classification. To engage in hypothesizing however, would be to render the rational basis standard no standard at all. As Justice Stevens noted while concurring in United States Railroad Retirement Board v. Fritz, 449 U.S. 166 (1980), 101 S.Ct. 453, 461-462, 66 L.Ed.2d 368 (1980): 'If the analysis of legislative purpose requires only a reading of the statutory language in a

In essence, a classification under the rational basis test will be sustained only if it "rationally furthers the purpose identified by the State". Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 314, (1976); San Antonio School District v. Rodriguez, supra, and Johnson v. Robinson, 415 U.S. 361 (1974).

Over the last decade, the United States Supreme Court has frequently recognized that the actual purpose of Congress (or the State), rather than post hoc justifications offered by government attorneys, must be the primary basis for analysis under the rational basis test.

---

disputed provision, and if any "conceivable basis" for a discriminatory classification will repel a constitutional attack on the statute, judicial review will constitute a mere tautological recognition of the fact that Congress did what it intended to do'."

G.D. Searle & Co. v. Cohn, -US-71 L.Ed2 250 (1982); Western & S.L.I. Co. v. Bd. of Equalization, supra; Schweiker v. Wilson, supra; Minnesota v. Clover Leaf Creamery Co., supra; U.S. Railroad Retirement Board v. Fritz, supra; Massachusetts Bd. of Retirement v. Murgia, supra; Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Johnson v. Robinson, supra; U.S.D.A. v. Moreno, 413 U.S. 528 (1973), and McGinnis v. Royster, 410 U.S. 263 (1973).

In the case at bar, the legislative objective advanced in support of N.J.S. 2A:34-16 was that the matrimonial trial fees were necessary to defray the cost of matrimonial actions in the Superior Court. But that legislative objective, as conceded by the State itself, was wrong! It was wrong in 1971, when the New Jersey Legislature failed to repeal the statute, and continued to be wrong for the next nine years.

During the 9-year period, the State wrongly collected millions upon millions of dollars from matrimonial litigants to defray a certain "cost" which "cost" never existed! To this, the Third Circuit majority astonishingly states that nine years is "not an unreasonable period" for a defective statute to penalize the matrimonial litigants of the State of New Jersey (Appendix A, Page 26a).

Assuming, but only for the sake of this argument, that the legislative objective of defraying the "cost" of matrimonial actions "could have reasonably" been contemplated by the legislature in 1971, is that legislative objective etched in stone to the extent that N.J.S. 2A:34-16 can never become unconstitutional - even when the State concedes that such a "cost" never existed?

It seems that the majority placed too much emphasis on attempting to justify the "cost" and "not enough emphasis on the

fundamental question of whether the [classification of matrimonial litigants under N.J.S. 2A:34-16] is substantially related to the achievement of that goal." Michael M. v. Superior Court of Sonoma County, 450 U.S. 464 (1981), Justice Brennan dissenting.

What makes the decision of the majority even more perplexing is that the State's legislative objective, besides being wrong, is totally unsupported by any evidence whatsoever. Nowhere is there any evidence of any kind to even offer the slightest suggestion that this legislative objective was contemplated by the New Jersey Legislature. Why? Because there is no such evidence. The idea for the purported legislative objective was conjured up by the state's appellate counsel and, for some reason, embellished by the majority.

Furthermore, the only documented evidence in this case which sheds any light on the "actual" legislative objective of N.J.S. 2A:34-16 is set forth by the New

Jersey legislature itself in the statement accompanying the repealer of the fee statute in 1980:

> "In the past, the $50.00 or $60.00 differential required for matrimonial cases was justified by an additional review provided in such cases by a standing master who determined whether or not the matter was fit for trial. Today, no similar review exists to justify any such differential in fees. As a result, these approval fees for matrimonial cases have been questioned as an unreasonable classification in an action pending before the Federal District Court. The elimination of these fees would thus serve to eliminate an anachronism from the Court's fee structure."

The majority chose to reject this clear legislative language and substituted its own totally hypothesized legislative objective which has no basis in any evidence. As Judge Sloviter stated in her dissenting opinion, "I see no reason why the majority's hypothetical rationale for

the special matrimonial fee should be preferred over that given by the legislature itself". Appendix A, Page 39, fn 4.[5]

Although the quotes below are dissenting opinions of cases which are distinguishable from this one, Justice Powell, with whom Justice Brennan, Justice Marshall and Justice Stevens joined, seemed to have this case in mind in Schweiker v. Wilson, supra, when they stated:

---

[5]Under the system of government created by our Constitution, it is up to the legislature, not the courts, to decide the wisdom and utility of legislation." Ferguson v. Skrupa, 372 U.S. 726 (1963).

Courts cannot substitute their social and economic beliefs for the judgment of legislative bodies. Minnesota v. Clover Leaf Creamery Co., supra (1981), and Kahn v. Shevin, 416 U.S. 351 (1975).

> "When a legitimate purpose for a statute appears in the legislative history or is implicit in the statutory scheme itself, a court has some assurance that the legislature has made a conscious policy choice... But when a legislative purpose can be the ingenuity of a government lawyer litigating the constitutionality of a statute, a reviewing court may be presented not so much with a legislative policy choice as its absence.
>
> "In my view, the Court should receive with some skepticism post hoc hypotheses about legislative purpose, unsupported by the legislative history."

Similarly, in U.S. Railroad Retirement Board v. Fritz, supra, Justice Brennan with whom Justice Marshall joined, stated:

> "This Court will no longer sustain a challenged classification under the rational basis test merely because Government attorneys can suggest a 'conceivable basis' upon which it might be thought rational ...Where Congress has expressly stated the pur-

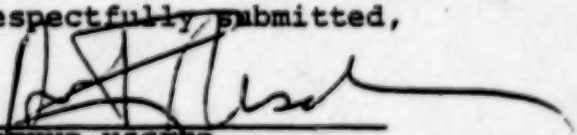
> pose of a piece of legislation, but where the challenged classification is either irrelevant to or counter to that purpose, we must view any post hoc justifications proffered by Government attorneys with skepticism. A challenged classification may be sustained only if it is rationally related to achievement of an actual legitimate governmental purpose.

If the constitutional validity of a statute is going to depend on the imagination of the State's counsel, then our Constitution is in deep trouble!

CONCLUSION

Equal protection and strict scrutiny are bulwarks of constitutional law which this court and all of the U. S. Circuit Courts of Appeals (including the Third Circuit itself) have spent generations refining and establishing. The majority decision which is the subject of this petition is a throwback to the Dark Ages of constitutional thinking and cannot be allowed to stand as precedent without a thorough review by Your Honorable Court.

Respectfully submitted,



ARTHUR USCHER
Counsel of Record
for Petitioners

ARTHUR USCHER, ESQ.
A Professional Corporation
Attorney for Petitioners,
DONNA M. MURILLO, et als

DATED: September 24, 1982